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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 28

JOHN WALTER OAKLEY, JR., PETITIONER

v.

LOUISVILLE & NASHVILLE RAILROAD CO.

No. 29

JOHN S. HAYNES, PETITIONER

v.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY [1]

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The district court wrote no opinion in either case (OR. 18; HR. 15).[2] The opinion of the Court of Appeals for the Sixth Circuit in No. 28 (OR. 21), which was also the basis for its judgment in No. 29 (HR. 17), is reported at 170 F. 2d 1008.

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[1] The petition named Southern Railway System as respondent. By order of this Court, dated May 2, 1949, the name now appearing was substituted.

[2] References to the record in No. 28, the *Oakley* case, will be indicated by "OR", and in No. 29, the *Haynes* case, by "HR".

JURISDICTION

The judgments of the Court of Appeals were entered on November 22, 1948 (OR. 21; HR. 17). The petition for writs of certiorari was filed on February 19, 1949, and was granted on April 4, 1949 (OR. 23; HR. 18). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the restored veteran's right, under Section 8 of the Selective Training and Service Act of 1940, to have service in the armed forces counted as service in the plant, so that he is not penalized in his job by his service to the nation, terminates at the end of the veteran's first year of reemployment.

2. Whether the veteran's right to recover wages lost during the first year of reemployment, by reason of the employer's failure to restore him to the job to which he was entitled, is cut off by the expiration of the first year of reemployment.

3. Whether the veteran's right to at least one year of reemployment is satisfied by restoration to a job inferior to the one to which he was entitled.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended by the Act of July 28, 1942, 56 Stat. 723, the Act of December 8, 1944, 58 Stat. 798, and the Act of June 29, 1946, 60 Stat. 341 (50 U. S. C. App. 308) provide as follows:

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year——

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of para-

graph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions,

such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * *

STATEMENT

These actions were brought in the United States District Court for the Eastern District of Kentucky under Section 8(e) of the Selective Training and Service Act of 1940. The plaintiffs were honorably discharged veterans who, having satisfied all the conditions prescribed by the Act, brought suit principally to gain restoration to the jobs to which they claimed to be entitled (OR. 1-3; HR. 1-3). The collective bargaining agents of the employees intervened in both cases and moved to dismiss the complaints on the ground that the questions involved had become moot because more than one year had elapsed since the veterans' restoration (OR. 13, 18; HR. 12, 14). The motions to dismiss as moot were granted before trial (OR. 18; HR. 15), and the orders of dismissal were affirmed by the court below (OR. 21; HR. 17).

In both cases, the complaints alleged that the veterans had been denied the jobs to which their sen-

iority would have entitled them had they remained at the plant and not gone into military service (OR. 2; HR. 2).[3] As a result of the veterans' absence in the armed forces, it was charged, employees remaining on the job, who otherwise would have had less seniority, were enjoying superior status (OR. 2; HR. 2). The complaints made clear that the veterans sought only the status that would have been theirs but for their military service; they sought no advantage over nonveteran employees beyond insisting that their time in the armed forces be counted as time on the job (OR. 2; HR. 2).

In No. 28, Oakley, prior to his induction in the armed forces on May 7, 1944, had been working as a locomotive machinist for the respondent railroad at Loyall, Kentucky (OR. 1). On July 1, 1945, the railroad's Loyall shop was transferred to Corbin, Kentucky (OR. 2). The collective bargaining agreement between the railroad and the intervening union provided that men furloughed at one point would receive preference in transfers to other points where men were needed with "seniority to govern" (OR. 6, 10). Had Oakley not been in the armed forces he would have transferred to the Corbin shop on July 1, 1945, and his seniority at Corbin would have commenced on that date (OR. 2). After his discharge and timely application for restoration, he was reemployed as a locomotive ma-

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[3] Since the cases were decided on motions to dismiss without trial, the factual allegations in the complaints must be taken as true for the purpose of this proceeding.

chinist at Corbin on July 17, 1946, with seniority from that date instead of July 1, 1945 (OR. 2). As a result of this reduced seniority, he was required to work the night shift rather than the day shift to which the earlier seniority date would have entitled him, and he was also subjected to the possible loss of his job entirely (OR. 2).

In No. 29, Haynes, prior to his enlistment in the armed forces on February 1, 1942, had been employed as a machinist helper and was reemployed as a machinist helper on his return in November, 1945 (HR. 1, 2). This position, however, was not the one he would have occupied on the basis of seniority had he remained in the service of the railroad (HR. 2). Between December, 1942, and February, 1943, while Haynes was in military service, six machinist helpers junior in seniority to him were promoted by virtue of their seniority to positions as helper apprentices at higher rates of pay (HR. 2, 6). Haynes was qualified and physically able to perform the duties of helper apprentice, and, on the basis of relative seniority, he would have been promoted no later than February, 1943, had he remained on the job (HR. 2). At the time of his reinstatement, therefore, he would have been a helper apprentice with seniority from the date of his promotion instead of a machinist helper—the job to which he was restored (HR. 2).

Both veterans prayed for decrees restoring them to the positions and to the seniority status they would have had but for their military service, and

for other appropriate relief (OR. 2; HR. 2-3). In the case of Haynes, there was also a specific prayer for the recovery of wages lost because of the railroad's failure to reinstate him as a helper apprentice with appropriate seniority upon his reemployment (HR. 2-3).

Before evidence had been taken in either case, the district court assigned for argument in No. 28 the question whether this Court's decision in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, required the proceeding to be held moot (OR. 18). Thereafter, the intervening unions filed formal motions of dismissal in both actions and the actions were dismissed as moot "because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant" (OR. 18; HR. 14-15). The court below affirmed the dismissal in each case on the ground that, under this Court's decision in the *Trailmobile* case, *supra*, petitioner "was entitled to restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed" (OR. 23; HR. 17).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred:

1. In holding that the protection within the framework of the seniority system, given a veteran

by the Act, including the right to the same position in the employ of the employer whose employ he left in order to enter the armed forces as is enjoyed by nonveterans with the same or less seniority who remained behind, and which position he would have occupied but for his military service, terminates one year after his reemployment.

2. In holding that the acceptance for one year by a veteran of a position inferior to that to which he is entitled terminates his claim to the protection of the Act and even divests him of an accrued right to wages lost by reason of his employer's violation of that Act.

3. In holding that the decision of this Court in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, compelled dismissal of these actions.

4. In affirming the judgment of the district court dismissing these actions.

SUMMARY OF ARGUMENT

The dismissal of the veterans' complaints in these cases can only be read as a determination by the courts below that the right, under Section 8 of the Selective Service Act of 1940, to have time in the military service credited as time on the job, expires at the end of the first year's reemployment. The decisions below are supportable on no other ground at this stage of the litigation. And, so grounded, the judgments below are erroneous.

I

The courts below have sharply curtailed the rights of veterans through their complete misconception of the effect of this Court's decision in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, upon which sole reliance was placed. This Court's opinion in that case contains unambiguous language making the judgment there expressly inapplicable to the precise question here involved, namely, whether the veteran is protected against discriminatory treatment after a year's reemployment. That case decided that any preferred status which the statute may have given veterans over other employees did not survive a year; it did not decide that, after a year, a veteran could be denied equal treatment with nonveteran employees who would have had identical seniority but for the veteran's military service.

The words of the statute, its legislative history, and this Court's pertinent decisions all point inescapably to the conclusion, rejected below, that the statutory requirement of restoration "without loss of seniority" is one which continues in force beyond the first year of the veteran's reemployment. Section 8 of the Act provided dual benefits: A veteran "called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law

withheld from those who stayed behind." *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284. It may be that the special advantage conferred does not survive the first year; it is certainly not true that the protection against being penalized is so limited. The sense of the Congress, expressed in Section 9 (c) (2) of the Selective Service Act of 1948 and declaratory of the rights conferred by the 1940 Act, was that a veteran be restored to his position "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." That is the status claimed in the complaints in these cases and denied by the courts below. And that "statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment." *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 58.

II

In any event, the right of a veteran to be compensated under Section 8(e), on account of his employer's failure to restore him to the position to which he is entitled does not disappear with the end of his first year of reemployment. There is no justification whatever for denying compensation

for damages suffered during a period admittedly covered by the Act because the Act's protection might be refused for a subsequent period.

III

Even if all Section 8 protection is terminated at the end of one year after a veteran's restoration, the judgments below are, nevertheless, erroneous. This limiting period, when applicable, cannot be deemed to have begun until the veteran has been restored to the position to which his seniority plus his military service credit entitles him. In these cases, the veterans have never been so restored.

ARGUMENT

The veterans here are asserting only their right under Section 8 of the Selective Training and Service Act of 1940 to be "restored without loss of seniority" to the jobs they left when they went into military service. They seek no advantage over those who worked alongside them at the time of their induction and no "preferred seniority standing" except to have their period of military service treated as time on the job so that their employment status will not be prejudiced by their service to the Nation. In this respect, the situation is quite different from that involved in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, where the restored veterans claimed a status which had been denied to all similarly situated employees, veteran and non-veteran employees alike.

The principal question for decision, therefore, is the duration of the right of veterans to receive credit within the framework of a seniority system for their period of military service and thus to maintain equality with nonveteran employees. Without examination into the rights conferred under the respective seniority systems involved to determine whether the veterans were seeking a special or merely an equal status, the court below held that the veterans were not entitled to a "preferred seniority standing" because a year had elapsed since their restoration. It is clear that what the court meant by "preferred seniority standing" was the right to receive credit for military service after a year. This is apparent not only from the fact that no analysis of the effects of the operation of the seniority system was made to compare the rights claimed by the veterans with those enjoyed by others, but also from the fact that both actions were disposed of on motions to dismiss, predicated solely on the fact that a year had elapsed since the veterans' restoration (OR. 18; HR. 14).

Both complaints alleged that the status sought would have been obtained solely on the basis of seniority if petitioners had remained on their jobs (OR. 2; HR. 2). Since these allegations must be taken as true for purposes of a motion to dimiss, there was no issue before the court below and there is none before this Court as to whether petitioners in fact would have been entitled to the positions they claimed by mere operation of the seniority system.

Determination of this question depends upon evidence not in the record because of the disposition of the suits before trial on motions to dismiss. The decision below, therefore, must be considered as a determination that the right under the Act to have military service credited for purposes of seniority expires at the end of the first year's reemployment, and the correctness of that decision is the main issue in this proceeding.[4] Two subordinate issues are also raised by the dismissal of the veterans' complaints. These are (1) whether the right to recover monetary losses suffered during the first year of reemployment as a result of improper restoration dies at the end of the year, and (2) whether reemployment at any job for a year terminates the veteran's claim to protection of the Act. None of these issues was involved in the *Trailmobile* case; consequently the summary dismissal of the complaint solely on the authority of that decision is insupportable.

[4] Although a request for admissions (OR. 4), a response to this request (OR. 10), and a motion for summary judgment (OR. 12), were filed in No. 28, it is apparent that they had no bearing on the decision in the case because no such procedural steps occurred in No. 29 in which the court relied for its judgment upon its decision in No. 28 (HR. 17).

The Right of Veterans to Receive Seniority Credit for Their Period of Military Service as Protection Against Discriminatory Treatment Is Secured for More Than One Year from the Date of Restoration

In both cases we start with the proposition that the veterans were denied positions to which their seniority alone would have entitled them had they remained on the job and not gone into military service. This denial was apparently based on the theory that the statutory protection requiring the period of military service to be counted as time on the job expired after the year's reemployment which the veterans had already enjoyed. The effect of the holding, therefore, is that, at the end of a year, time spent in military service may be subtracted from the restored veterans' job service and their seniority accordingly reduced. Thus, the decision below is open to question not because it denies the restored veterans any preferred status over nonveteran employees, but because it actually places them in an inferior position. They have been discriminated against so that as a result of their service to the nation they have been permanently prejudiced in their job status and nonveteran employees have gained a permanent advantage over them. As previously indicated, the court below reached this result on the theory that it was required by *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, which it construed as limiting the veterans' right to restoration without loss of seniority to a single year.

This ruling completely misconstrues this Court's decision in *Trailmobile* and misinterprets the effect of the statute. The court below regarded as decided in *Trailmobile* the question upon which decision was expressly reserved. In that case the veteran's claim was that Section 8 protected him, more than a year after his restoration, from a reduction in seniority suffered by all employees of the company for which he had worked, veteran and nonveteran alike, upon the consolidation of that company with another. The Court decided that any preferred status which the statute may have given veterans over other employees did not survive a year. The Court refused to decide whether after a year veterans were assured equal treatment with nonveteran employees who would have had identical seniority but for the veterans' military service. The Court, in the *Trailmobile* case, specifically held that it was "not required to determine the further question whether the statute would give protection to a reemployed veteran after the statutory year" in the event of discriminatory treatment in comparison with a nonveteran, found it unnecessary to pass upon whether "all protection afforded by virtue of § 8(c) terminates with the ending of the specified year," and expressly reserved "decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker." 331 U. S. at 60. Although the Court did

not have before it the question of the duration of the veteran's right to equal treatment by crediting military service as service in the plant, the decision points out that "It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment" (p. 58). The reliance of the court below upon the *Trailmobile* decision for its holding is, therefore, an obvious misconception of the holding of that case.

Neither the statutory language nor its purpose permits the untoward result reached by the court below. Its interpretation of the statute, moreover, is in conflict with the basic legislative objective reiterated in the opinions of this Court.

A. *Section 8 does not limit the right of restoration "without loss of seniority" to one year.*—The pertinent portions of Section 8 (*supra*, pp. 3-4) provide that the veteran shall be restored—

> * * * to a position of like seniority, status, and pay * * *

and that a veteran restored to a position in private industry—

> * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer

> at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

This language does not support the construction that the requirement of restoration "without loss of seniority" is limited to one year's duration. The very nature of the benefits provided precludes a construction in the absence of unambiguous language requiring it, which confines them to so short a period. The same section that requires veterans to be restored "without loss of seniority" also extends comparable protection to their pension and retirement rights by the clause relating to "insurance or other benefits offered by the employer pursuant to established rules and practices." According to Senator Sheppard, Chairman of the Senate Military Affairs Committee which drafted the legislation, Section 8(c) was intended "to prevent loss of seniority, accrued employment benefits, including participation in insurance, pension, bonus, and other beneficial programs." 86 Cong. Rec. 10095. And Representative May, Chairman of the House Military Affairs Committee, explained, with particular reference to railroad employees, that (86 Cong. Rec. 11702)—

> * * * we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Clearly, men young enough to be drafted for a year's service would not be eligible for pensions or

retirement within a year after their restoration nor, in fact, until many years after their return to employment. Nothing could more emphatically negate an intention to limit the statutory protection for pension and retirement rights to a year of employment. And the structure of Section 8(c) furnishes no basis for drawing a distinction in this respect between seniority rights and other benefits.

The sole provision limiting protection to a year is the guarantee that the veteran "shall not be discharged from such position without cause within one year after such restoration." But it would seem to be a gross distortion of the ordinary meaning of words to interpret a prohibition against discharge as creating a restriction upon the duration of other rights which contain no time limitation. To the extent that the prohibition against discharge for a year may enchance other incidents of the restored veteran's position by preventing even their non-discriminatory adverse modification, it is effective for only a year. See *Trailmobile Co.* v. *Whirls, supra.* The time limit of a year, however, is not thereby imposed upon those aspects of the benefits which are not enlarged by the prohibition against discharge. Thus, the veteran's right to be restored to his job without loss of seniority assures him that he will be treated the same as similarly situated employees who remained on the job. The prohibition against discharge, however, may possibly provide the additional benefit of preventing adverse modification

of his seniority rights for a year notwithstanding such modification of the rights of nonveteran employees.[5] Only the latter protection expires after a year because it flows from the prohibition against discharge. The protection unrelated to the discharge prohibition, however, extends beyond the year because there is no statutory time restriction.

The dual nature of the benefits provided by the Act has been recognized by this Court in both *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, and *Trailmobile Co.* v. *Whirls, supra.* The *Fishgold* opinion points out that (p. 284)—

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

The protection against being penalized is contained in the provisions having no period of limitation. The advantage "withheld from those who stayed behind" is provided by the prohibition against dis-

[5] "For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy. But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress." (331 U.S. at 58-59.)

charge for one year. The interpretation of the prohibition against discharge as conferring an additional benefit rather than as circumscribing those previously provided is confirmed by the Court's further statement that what Congress "undertook to do was to give the veteran protection within the framework of the seniority system *plus a guarantee against demotion or termination of the employment relationship without cause for a year*"[6] (p. 288). The *Trailmobile* opinion similarly acknowledges two types of benefits. It held that the "preferred status" provided by "the extraordinary statutory security" against adverse alteration of restored rights extended for only a year (331 U. S. at 59). But with respect to being "disadvantaged by his service to the nation," it made clear "that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment" (p. 58).

The guarantee against discharge for a year has the further purpose of providing a mimimum of tenure in those industries where the employees' status does not have the protection of a collective bargaining agreement. In organized industries "the union would normally afford its members protection against termination of their employment status without cause." *Fishgold* v. *Sullivan Corp.*, 328 U. S. at 288. In other situations, however, where the terms of the employment status do not include seniority or other rights, the one-year guaran-

[6] Italics throughout the brief are supplied.

tee may be the only protection available to the returning veteran against arbitrary dismissal after formal compliance with the Act's restoration requirements. It is apparent, therefore, that the one-year guarantee against discharge has its own separate scope and does not operate to shorten the life of other benefits which are conferred without time restrictions.

It also appears that Congress considered virtually identical language in the 1948 Act with respect to a guarantee against discharge for a year as providing protection *in addition* to the other benefits. With respect to the paragraph of the Selective Service Act of 1948 (Public Law 759, 80th Cong.) which "reenacts section 8(c) of the 1940 act," the Senate Report states that "It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service, such as accumulated seniority rights and insurance benefits. *In addition,*" the explanation continues, "the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration." S. Rep. 1268, 80th Cong., 2d sess., p. 16. Thus, it would seem to follow, that the time limitation would be co-extensive with the additional benefits. See *supra*, pp. 19-20.

B. *Congress intended to preclude penalties from attaching to a veteran on account of his service to the nation.*—The legislative material is rich with evidence of the Congressional purpose to restore

the returning veteran without disadvantage because of his military service. Equality of position without loss of seniority as compared with non-veteran employees was viewed as having substantial importance to the veteran. Had Congress contemplated withdrawal of his right to equality after a year, that limitation could hardly have escaped mention, let alone debate. But not a word even suggesting that possibility is to be found in the legislative record. The thought that his employer was free to penalize him because of his military service at the expiration of a year cannot, therefore, be harmonized with the consistent pattern of legislative action and expression.

The Congressional concern for preserving the status of veterans was evidenced early in connection with the provisions concerning reemployment without loss of seniority which first appeared in the successive prints in the Senate Committee on Military Affairs of S. 4164, which, together with H. R. 10132, eventually became the Selective Training and Service Act of 1940. See Committee Print No. 1, July 23, 1940; Committee Print No. 4, July 27, 1940; Committee Print No. 5, July 31, 1940. These reemployment provisions were incorporated in S. J. Res. 286, the parallel bill which eventually became the National Guard Act and were first debated in Congress in connection with that bill.[7] See

[7] In tracing the development of Section 8 of the Selective Training and Service Act, reference will be made to the legislative history of both that Act and the National Guard Act, since both were simultaneously under consideration, and because a deliberate attempt was made to keep their reemploy-

S. Rep. No. 1987, 76th Cong., 3d sess. Various language changes in conference to reconcile the House and Senate versions of the bill, were explained by the Chairman of the House Military Affairs Committee as follows (86 Cong. Rec. 10761):

> * * * You will find that in amendments numbered 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

S. J. Res. 286 was passed by both Houses with these changes (86 Cong. Rec. 10759-10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858).

The purpose to count time in the service as time on the job was emphasized when these reemployment provisions were carried over into the selective service bill (86 Cong. Rec. 10922-10923) with a further amendment elaborating paragraph (c) to its present form. 86 Cong. Rec. 10914, 11702. The changed paragraph with the italicized portions in-

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ment provisions identical. Changes made in one were incorporated into the other without further debate.

dicating the added and amended language, read as follows:

> Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered during the the period of service in such forces as on furlough or leave of absence; and* shall be so restored without loss of seniority; *and shall be entitled to participate* in insurance or other benefits *offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces*; and shall not be discharged from such position without cause within 1 year after such restoration.[8]

The chief purpose of this amendment, according to Chairman May, was (86 Cong. Rec. 11702)—

> to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service *and they will even be permitted to count this time on the question of their retirement.*

Throughout the Congressional consideration of the reemployment provisions, both in the National

[8] This change was then made in the appropriate section of the National Guard Act, previously passed, so as to conform the two statutes. See Section 8(d) of the original Selective Training and Service Act, 54 Stat. at 891, amending Section 3(c) of the National Guard Act.

Guard and the selective service bills, the right of restoration to a job without loss of seniority was frequently emphasized and its limitation to one year was never suggested. Senator Sheppard, Chairman of the Senate Military Affairs Committee, described Section 8 as an attempt "to prevent loss of seniority, accrued employment benefits * * * and other beneficial programs" (86 Cong. Rec. 10095), and the identical provision in the National Guard Act as an effort to insure that returning veterans be restored "to their former employment at the end of their training or to employment of similar pay and status." He further explained that "Persons restored to * * * positions in private employment shall be so restored without loss of seniority, insurance participation, or other benefits, and such persons shall not be discharged from such positions without cause within 1 year after such restoration." (86 Cong. Rec. 9836.) Senator Thomas, another member of the Senate Military Affairs Committee, referred to Section 8 as an attempt " * * * to make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." (86 Cong. Rec. 10572.) Representative Celler considered Section 8 as a direction to private employers to restore the returning veteran "to [his original] position, or to a position of like seniority, status, and pay * * * ", and that under these provisions, "All those who serve shall have the right to claim return to their jobs." 86 Cong. Rec. 11435. Rep-

resentative Healey stated that "You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their *status quo* before they were inducted into the service" (86 Cong. Rec. 11703). This emphasis upon restoring veterans to their jobs without prejudice to their status, in the absence of any time qualifications, appears to rule out the conclusion that penalties in job status, solely because of military service, could be imposed at the end of a year.

The 1946 reenactment of the Act (60 Stat. 341, 342), continuing Section 8 indefinitely, also evidences the Congressional intention to have seniority protection survive a year. The enactment was intended to make the section "permanent law" (Statement of Managers on the part of the House of Representatives, 92 Cong. Rec. 7472) and "perpetual" (statement of Chairman May, 92 Cong. Rec. 3588). Chairman May stated: "Section 8 of the act is the one that guarantees a man priority or seniority rights to a job, or to his old job when he returns from the service and we have maintained that provision and made it perpetual so long as the act is in effect." It is unlikely that Congress would have thought it necessary to enact Section 8 into permanent law, if all veteran's reemployment rights expired within a year after initial reinstatement.

There is a further suggestion that the rights under the 1940 act were thought to be continuing

rights in the explanation of the Senate Committee on Armed Services that no important substantive changes with respect to reemployment were made in the 1948 act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2d sess., p. 15. Veterans who were back on their jobs when the 1948 act was passed would ordinarily have completed their first year of reemployment by the time a trainee had completed the twenty-one-month service period under the 1948 act. See Selective Service Act of 1948, Section 4(b).

Additional corroboration for the interpretation that seniority protection was not limited to a year is furnished by Congress' own construction of language virtually the same as that under consideration here. Section 9(c)(2) of the Selective Service Act of 1948, referring to language identical with that contained in Section 8(b) of the 1940 Act except for additions not relevant here, provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his en-

> tering the armed forces until the time of his restoration to such employment.

It should be noted that this paragraph does not purport to create additional benefits but merely to state the effect of the provisions referred to. The Senate Report refers to this provision as a "Statement of policy regarding application of the 'escalator principle'" (p. 16). The so-called "escalator principle" is obviously a reference to the principle announced by this Court in the *Fishgold* case which dealt with the very provisions involved in this case. There is no suggestion in the language employed that the status to which the veteran was to be restored was to last for only a year, nor that the time in military service was to be subtracted at the end of a year. The pains Congress took to explain its intention indicate that the one year limitation would have been included in the explanation if such a limitation had been intended. See, also, S. Rep. No. 1268, 80th Cong., 2d sess. (1948), p. 16.

C. *This Court has made it clear that the right to have the period of military service treated as time on the job is not limited to one year.*—The "sense of the Congress" incorporated in the Selective Service Act of 1948 in effect ratifies this Court's previous interpretation of Section 8, which accords with the prior legislative history. The note that the restored veteran is to suffer no loss in job status by his military service is consistently sounded. This assurance and the language used to express it seem completely incompatible with the

view that the protection extended is extremely short-lived. In *Fishgold* v. *Sullivan Corp., supra,* it was explained that the restored veteran "was not to be penalized on his return by reason of his absence from his civilian job" and that "he does not step back on the seniority escalator at the point he stepped off" (p. 284). Rather, "he steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285). The provisions of Section 8 were deemed to "guarantee the veteran against loss of position or loss of seniority by reason of his absence" and "his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285). Thus "Congress made the restoration as nearly a complete substitute for the original job as was possible" and "protected the veteran against loss of ground or demotion on his return" (p. 286). The position to which the veteran was entitled to be restored was "the 'position' which he left plus cumulated seniority" (p. 287). The Act recognized "the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence" (p. 288). The appraisal of the statutory purposes in these unconditional terms can hardly be squared with the holding of the court below that there was a one year condition on the enjoyment of the Act's benefits.

Similar views as to the effect of Section 8 were expressed in *Trailmobile Co.* v. *Whirls, supra.* The *Fishgold* case was described as holding "that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41) so that his "standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (p. 56). Men were said to have been inducted for a year's training "with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58). The holding that the restored veteran "could not be disadvantaged by his service to the nation" nor penalized by reason of his absence was reiterated (p. 58). In *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521, the Court's opinion again observed that "under the Act the veteran accumulates time toward his seniority while in the service" and has "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force" so that he is protected "from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough' " (pp. 525-526). The restored veteran's rights were held to be determined by the collective agreement "inasmuch as that agreement in no wise disad-

vantaged his position because he was in the military service" (p. 528). And, most significantly here, the duration of the right to receive seniority credit for military service was clearly indicated when this Court stated in *Trailmobile* "that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of the first year of reemployment" (p. 58).

In the *Fishgold, Trailmobile,* and *Campbell* cases, the restored veterans sought preferred status over nonveteran employees. In the instant case, however, neither veteran has at any time sought any form of superseniority. Rather, each alleges that he was reemployed in a position which was inferior to the one he would have had if he had remained on the job instead of serving in the armed forces. Oakley, who was reemployed as a locomotive machinist at Corbin, with seniority as of the date of his reemployment, contends that he is entitled to seniority as of July 1, 1945, the date during his absence on which he would have been transferred to Corbin. He asserts that the result of this loss of seniority has been to relegate him to night work and, more important, to put him in a more vulnerable position with respect to layoffs. Haynes, who was reemployed as a machinist helper, alleges that had he remained on the job he would have been promoted to helper apprentice with higher pay, as were six nonveterans who had less than his seniority at the time he entered the armed forces.

The decisions below thus go far beyond the *Fishgold, Trailmobile* and *Campbell* cases in holding that the veteran's right to equality of treatment and the protection of his position on the seniority escalator endure for only the first year of reemployment.[9] The obvious and direct result is to make Section 8(c) a dead letter for most veterans of World War II.

In such highly organized industries as the railroad industry, seniority rights determine almost every aspect of employment, including promotions, retirement, pension rights, lay-offs, discharges and transfers. If, after the expiration of the statutory year, the veteran has no protection against a refusal to credit the time spent by him in the service toward such rights, he has been permanently and most seriously "penalized on his return by reason of his absence from his civilian job" contrary to the clearly expressed Congressional design as recog-

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[9] For reasons already stated the Court does not have before it the question whether the veterans would in fact be entitled under the terms of the applicable collective bargaining agreement to the status they assert. Since both cases were decided on motions to dismiss the complaints, it would seem inappropriate at this time to attempt to appraise the effect of the collective bargaining agreements without the benefit of evidence relating to the interpretations of the parties, the actual practices under them, and other relevant considerations. In any event, however, it would seem that any contractual requirement that a veteran be actually on the job in order to receive seniority credit or obtain a seniority benefit would be inoperative as inconsistent with the plain mandate of the statute that military service must be treated as the equivalent of time on the job. Any further requirement, as a condition to the enjoyment of an automatic seniority benefit, that a form be executed, which as a practical matter necessitates the veteran's presence, runs into the same statutory objection.

nized by this Court. The result is also inconsistent with this Court's construction that the time spent in military service must be counted as time on the job in computing seniority—a construction which Congress has expressly ratified. We think it clear that Section 8(c) protects the veteran's rights within the framework of a seniority system beyond a year and that this protection extends to the inclusion of service-acquired seniority in the computations of seniority. While a veteran's seniority rights may be modified after the first year of reemployment by arrangements which do not discriminate against him, the statutory assurance that his military service will be counted protects him against discriminatory treatment effected through discounting his military service. See *Spearmon* v. *Thompson,* 173 F. 2d 452 (C.A. 8); *Morris* v. *Chesapeake & Ohio Ry. Co.,* 171 F. 2d 579 (C.A. 7); *Rudisill* v. *Chesapeake & Ohio Ry. Co.,* 167 F. 2d 175 (C.A. 4); *Mentzel* v. *Diamond,* 167 F. 2d 299 (C.A. 3); *Connor* v. *Pennsylvania Railroad,* decided August 1, 1949, (C.A.D.C.).

II

The Right to Recover Back Pay Is Not Defeated by the Expiration of One Year from the Date of Restoration

In addition to its erroneous denial of statutory protection beyond a year, the decision of the court below also incorrectly deprived Haynes of rights which vested during his first year of reemployment. The railroad's failure to restore Haynes as a helper

apprentice in accordance with his seniority resulted in his receiving a lower rate of pay during the first year of his reemployment (HR. 2). His complaint specifically prayed for recovery of "the increase in wages which he would have been entitled to receive" had he been reemployed as a helper apprentice (HR. 2-3).[10] Section 8(e) of the Act explicitly contemplates compensation for loss of wages as an incident to other remedies under the Act. The effect of the decision below is to rule that, although Haynes may have been entitled to be reemployed as a helper apprentice for one year, he cannot recover monetary damages after the year for the railroad's failure to so reemploy him during the year.[11] Certainly there is nothing in the *Trailmobile* opinion, the sole authority for the lower

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[10] The respondent in No. 29 charges that Haynes was guilty of laches. Br. in Opp. But that question is not open in this Court on the present record since, as has already been noted, *supra*, pp. 13-14, the case was disposed of on a motion to dismiss before trial. The question of laches is one of fact upon which there has been no trial.

[11] Although this question is not expressly dealt with by either the court below or the district court, it is clear that the dismissal of the complaint by the district court and the affirmance of this dismissal by the court below effectively dispose of Haynes' right to recover back pay. On the appeal below, the attention of the parties and the court were directed at the district court ruling apparently denying all Section 8 rights. In that posture of the case, the specific right to back pay was comprehended within the broader contentions advanced by the veteran and rejected below. But since both courts of necessity ruled upon the validity of the complaint which specifically requests the award of back compensation, and since the record contains no waiver of this claim, the question of the right to recover underpayments for the first year of reemployment seems properly presented by the record in No. 29.

court's decision, to support this result, and it cannot be upheld on the basis of policy or reason. Even assuming with the court below that a veteran's rights endure for only the first year of reemployment, it does not follow that the cause of action for the amount of the veteran's financial loss resulting from violation of those rights must be determined within that year. To so hold, considering the practicalities of litigation, effectively destroys the sanction of damages for violation of Section 8. Although the question has never been passed upon by this Court, many lower courts have recognized the existence of authority to award monetary damages after the expiration of the statutory year and where no question of reinstatement was involved. *Feore* v. *North Shore Bus Co.*, 161 F. 2d 552 (C.A. 2); *Bochterle* v. *Albert Robbins, Inc.*, 165 F. 2d 942 (C.A. 3); *Williams* v. *Dodds*, 163 F. 2d 724 (C.A. 9); *Heller* v. *Inter-Boro Savings & Loan Ass'n*, 166 F. 2d 83 (C.A. 3); *Loeb* v. *Kivo*, 169 F. 2d 346 (C.A. 2); *Houghton* v. *Texas State Life Insurance Co.*, 166 F. 2d 848 (C.A. 5); *Special Service Co., Inc.* v. *Delaney*, 172 F. 2d 16 (C.A. 5); *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3); *Rudisill* v. *Chesapeake & Ohio Ry. Co.*, 167 F. 2d 175 (C.A. 4); *Foor* v. *Torrington Co.*, 170 F. 2d 487 (C.A. 7); *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F. 2d 46 (C.A. 3); cf. *Spearmon* v. *Thompson*, 173 F. 2d 452 (C.A. 8). It is difficult to find justification for denying compensation for damages suffered during a period admittedly covered by

the Act because the Act's protection might be refused for a subsequent period.

III.

The One Year Limitation on Section 8 Rights, Even When Applicable, Does Not Start Running Until a Veteran Has Been Properly Restored

Even if it should be decided that all protection ends one year after a veteran's restoration, we submit that this year should not be deemed to have begun until the veteran has been restored to the job to which his seniority plus his military service credit entitles him. The complaints in the instant proceeding should not have been dismissed therefore, because in both cases the veterans were restored to positions inferior to the ones to which their seniority entitled them.

Oakley was assigned to a more burdensome shift and was more vulnerable to layoff and discharge. Haynes was assigned to a lower grade of work at a lower rate of pay. These were the allegations of their complaints which must be taken as true for the purpose of this proceeding. Since the complaints were dismissed, the decision below must be construed as holding that even if veterans have not been restored to proper positions, their statutory protection nevertheless expires if they have been reemployed for a year in any position. The *Trailmobile* decision clearly is no authority for this holding. In that case, the veteran had been properly restored for a year and the only question was

the duration of certain benefits beyond a year. The Court was not confronted with, and did not pass upon, the problem of the effect of restoration to an inferior position for a year. Thus even if all statutory rights expire at the end of a year's reemployment, *Trailmobile* does not support the view that the year's protection may be terminated by restoration to an inferior position.

Moreover, the statutory language precludes the holding that the period of protection expires before there has been compliance with the terms of the Act. The only possible basis for limiting veterans' rights to one year is the provision in Section 8(c) prohibiting discharge "from such position without cause within one year after such restoration." "Such position" is the position the veteran left or one of "like seniority, status, and pay" (8(b)). "Restoration" is to be without loss of seniority (8(c)). Where the veteran has never been restored to his proper position in accordance with these directions, the restoration contemplated by the Act, which starts the running of the year, has never taken place. Therefore, there is no basis for considering the rights to be exhausted.

Petitioners have asked for restoration in accordance with the requirements of the Act; the record shows only that they have been given employment inferior to that to which they are entitled under the Act. By accepting this employment while endeavoring to secure restoration in accordance with the terms of the statute, they cannot be deemed to

have waived their rights to such restoration. *Loeb* v. *Kivo*, 169 F. 2d 346 (C.A. 2); *Troy* v. *Mohawk Shop, Inc.*, 67 F. Supp. 721 (M.D. Pa.); *Freeman* v. *Gateway Bakery Co.*, 68 F. Supp. 383; (W.D. Ark.) *Radzicki* v. *Columbia Aircraft Prod., Inc.*, (D.N.J., 12-10-46); *Covey* v. *Douglas Aircraft Co., Inc.*, (S.D. Calif., 10-22-46); *Newman* v. *Hi-Hat Elkhorn Mining Co., Inc.* (E.D. Ky., 9-4-46); *Laeuger* v. *Todd Pacific Shipyards, Inc.* (W.D. Wash., 11-30-45); *Blankenship* v. *Newcastle Coal Co.* (N.D. Ala., 10-11-46). Under any interpretation of the duration of the Act's protection, nothing less than proof that the veteran has been restored to the position the Act requires and retained in that position for a year should bar the veteran from relief.

CONCLUSION

The restrictive holding of the court of appeals with respect to the duration of restored seniority rights is based upon a complete misconception of this Court's decision in *Trailmobile Co.* v. *Whirls*, *supra*. This Court was not there concerned with the basic problem presented here and specifically reserved decision with respect to it. The statutory language, the legislative history, and the previously expressed views of this Court with respect to the nature of the protection provided require reversal of the judgments below.

Respectfully submitted,

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